

Supreme Court. U. S.

FILED

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**In the Supreme Court
of the United States**

MARCH TERM, 1977

76-1326

No. _____

GEORGE ARMSTEAD GAINES,

Petitioner,

v.

STATE OF OREGON,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES**

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v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, George Armstead Gaines, respectfully prays for a Writ of Ceriorari to issue to review the denial of petition for review by the Supreme Court of the State of Oregon entered on January 11, 1977, and the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on October 25, 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon appears at 27 Or. App. 69, — P.2d — (1976), and appears in the appendix to this petition. A copy of the denial by the Supreme Court of the

State of Oregon of the petition for review also appear in the appendix. No opinion was rendered by the Circuit Court for the County of Multnomah (No. C 75-08-2791). The judgment appears in this appendix.

JURISDICTION

The Supreme Court of the State of Oregon denied the review of the Oregon Court of Appeals' opinion on January 11, 1977, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Whether, in a criminal action for attempted murder, the failure of the prosecution to supply defense counsel with the reports of the Federal Bureau of Investigation/Drug Enforcement Agency, which defense counsel had specifically requested by proper discovery motion, until the second day of trial and after the testimony by the FBI agents constituted a denial of due process under the Fourteenth Amendment of the United States Constitution, so as to constitute reversible error.

(2) Whether the automatic introduction of evidence over objections of defendant's prior convictions, which were remote in time and of no probity on the issue of veracity, under Oregon Revised Statutes 45.600, constituted a denial of due process under the Fourteenth Amendment of the United States Consti-

tution by unfairly prejudicing the jury and denying the defendant of a fair trial, and by forcing the defendant by having to weight the prejudicial effect of such evidence against his constitutional rights to testify in his own defense.

STATUTE INVOLVED

Oregon Revised Statutes 45.600 [hereafter cited as ORS], reads:

"A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth is bad or that his moral character is such as to render him unworthy of belief; but he may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination or by the record of the judgment, that he has been convicted of a crime."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from an appeal from the criminal trial adjudging George Armstead Gaines guilty of two counts of attempted murder and one count of recklessly endangering another person in violation of ORS 163.115 and 163.195, respectively. On November 20, 1975, Multnomah County Circuit Court, after a jury trial, sentenced defendant for a term of imprisonment not to exceed 20 years on Count I and 10 years on Count II, to run consecutively. That court's trial order and judgment are attached hereto.

The charges involved herein resulted from an altercation occurring in the alleged victim's Portland residence. Mr. Gaines was brought to trial in Multnomah County Circuit Court on November 10, 1975. At trial, Mr. Gaines was prepared to admit to the fact that a witness, Denise Burks, was arrested at the Los Angeles Airport with \$47,000 on her person when she was transporting that money to California for Mr. Gaines and three other people for the purpose of purchasing a liquor store (Tr. 2). Over the defendant's objections, the Court allowed the State to refuse to accept defendant's stipulation and put on evidence to prove those facts to which defendant was willing to stipulate.

The incident of Ms. Burks' detention and search in Los Angeles was a catalyst for the events from which the criminal charges against the defendants arose. The series of events which ultimately culminated in the argument and shooting which was the subject of the defendant's trial arose from that detention. FBI agent, Ducker, O'Neill, and Cleary related to the jury the details of the airport arrest of Denise Burks on Bankrobbery charges (Tr. 337), using false identification (Tr. 349), her prior conviction for crimes (Tr. 343), the fact that she was carrying \$47,000 in cash and had lied about the amount (Tr. 338), and finally, her intimacy with the defendant, George Gaines (Tr. 348). Defendant had made a specific motion for discovery of all material information regarding detention of Ms. Denise Burks in Los Angeles (See Appendix). After direct examination of Agent Ducker,

prosecution presented defendant with a copy of the FBI report on the Los Angeles incident (Tr. 27). Defendant moved for dismissal for failure of the prosecution to make the information available in advance of trial. The motion was denied (Tr. 33).

"MR. CONNALL: It is clear, then, from this report, which has just been made available to me this morning, that there was, in fact no probable cause for the arrest and detention of Denise Burks for approximately one week for the seizure of property which at the time was in her possession, and since it was money, hers for all practical purposes. In fact, that arrest was a subterfuge. . .

THE COURT: In fact what?

MR. CONNALL: It was a subterfuge. She was not a suspect in the Bankrobbery; it was known to everyone she was not. She simply had a large sum of money on her, and they wanted to get their hands on it and to hold, and to hold her in custody. This is *Brady* material. The State has failed to disclose to me until this morning, second day of trial. I, therefore, move for a dismissal of this case.

THE COURT: It is denied."

The objections of the defendant the Court admitted the State's offer for impeachment purposes of evidence of defendant's 1964 convictions of Robbery and Grand Theft (Tr. 387). Defendant objected on relevancy grounds, explaining that the convictions were so old as to be remote, were not convictions for crimes involving the truth and veracity of the defendant, and therefore not probative of credibility and furthermore,

that such convictions were highly prejudicial (Tr. 388). Defendant argued that because the trial involved essentially a one to one issue of credibility, the court's decision to admit evidence of defendant's prior convictions was crucial (Tr. 388). Defendant was the only defense witness to the altercation involved in these charges. He went alone to the Reid residence to discuss Denise Burks' arrest in Los Angeles.

"MR. CONNALL: It is my fault, your Honor, I forgot to make a record of this issue. The defendant has previously been convicted of a crime, an assault kind of crime, not a veracity kind of crime. It is our desire that he take the stand to testify, and the State is permitted to impeach him with his prior conviction of that felony, which is not veracity in nature, then, of course, his credibility is assailed both by the testimony and by the Court's instruction. We would, therefore, at this time assess the nature of the crime, which I will call an assault crime, that it does not go to the issue of veracity and is, therefore, not relevant as to credibility. I will hand the Court the conviction record.

"The Court has those two exhibits before it, and those were the nature of the crimes which were charged, and those were not veracity kinds of crimes. Based on that, we would, therefore, move that the Court at this time make a ruling on the question of the use of those prior convictions for purposes of attempted impeachment of this defendant.

"THE COURT: Well, at this moment, without ruling upon the question as to whether the entire

exhibit in each case is admissible, as I understand the point you are trying to make, Mr. Connall, is that this type of conviction, which doesn't involve a crime in which veracity is an element, shouldn't be admitted without taking up the pages, themselves.

I would say this: Do you know of anything, since the Decision of our Court of Appeals that you can impeach a person for D.U.I.L., do you know of anything since then to change that?

THE COURT: There is no objection to your making a record. I have expressed by (sic) own opinion many times, that I think that the law is ridiculous (sic) which says that you can impeach a person for a conviction of prior crimes when those crimes, themselves, don't involve any element of want of veracity or truthfulness or honesty. However, I am sitting as a Trial Court, and they will be allowed because of what I conceive to be the Statutory law of the State as interpreted by our Appellate Courts.

MR. CONNALL: All right. I have my objection to the Court's ruling on that question?

THE COURT: Oh, certainly.

MR. CONNALL: Thank you (Tr. 9-11) . . .

They are both so old as to be remote. Neither is a veracity kind of crime. And for those two additional reasons, they are highly prejudicial. As I have advised the Court before, it is strictly (sic) credibility issue, one-on-one. I think that makes my record on those." (Tr. 388).

In relation to the defendant's prior convictions,

the Court instructed the jury as follows:

"If you find that the defendant has previously been convicted of a crime, you may only consider this for its bearing on the believability of his testimony; and it must not be considered by you as any evidence bearing upon his guilt or innocence of the crime charged here." (Tr. 437, 438).

The question related to the discovery of the FBI report was the defendant's third assignment of error on appeal to the State Court of Appeals, and the question of the use of prior convictions for impeachment purposes was the defendant's fourth assignment of error on appeal (App. Br. 14-36).

REASONS FOR GRANTING WRIT

I

The decisions below are in conflict with the decision of this Court in *Brady v. Maryland*, 373 U.S. 83 (1963), that is, failure to provide requested material until the trial was underway constituted prejudicial and reversible error.

The defendant had made extensive pre-trial motions for discovery. Included in the motion was a specific request for all of the FBI reports concerning Denise Burks. The report concerning the facts surrounding the detention of Ms. Burks in Los Angeles was not made available to the defendant until the morning of the second day of trial. The failure of the prosecution to produce this material information as demanded by the defense was a violation of the due process as guaranteed by the Fourteenth Amendment

of the United States Constitution, as expressed in the case of *Brady v. Maryland*. The incident of Ms. Burks' detention and search in Los Angeles was catalyst for the events in Portland from which criminal charges against the defendant arose. The series of events which ultimately culminated in the argument and shooting which was the subject of the defendant's trial arose from this detention. The information in this report, which indicated that there was no factual basis for the FBI's search of Ms. Burks, was material to the defendant's case. The report was not available to the defense until after the examination of FBI special agent Ducker concerning the Los Angeles incident was underway. This information, if received before trial, would have favorably affected the defendant's defense. Mr. Gaines needed all of the information available concerning the causes of and facts surrounding the Los Angeles incident, in order to aid him in the construction of his self-defense argument, thereby being material to the defendant's guilt or innocence. The FBI report would also have been helpful and aided the defendant in the examination and impeachment of the State's witnesses. It should be noted that while the State insisted that the report itself was irrelevant (Resp. Br. 16; Tr. 34, 41-42), the State insisted on presenting evidence dealing with the incident, notwithstanding defendant's offer to stipulate (Tr. 4). According to the State, the events in Los Angeles were at one time greatly relevant and totally irrelevant.

Under the rule of *Brady v. Maryland*, "... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* at 87.

In *United States v. Houston*, 339 F. Supp. 762 (1972), it was held that the government has an affirmative duty under the due process clause to make available information which would be helpful to the defendant either as direct or impeachment evidence well in advance of trial. In the present case the prosecution had agreed, in fact, to make all such information available to the defendant. The good faith of the prosecution is not at issue. Although the prosecutor claims he did not have the report himself until the morning of the second day of trial, he was under an affirmative duty, as an agent of the State, to assure the defendant of the availability of material information in the State or Federal law enforcement agency's possession. Various law enforcement agencies involved could, in the exercise of reasonable care, have had this information transmitted to the prosecutor and the defense counsel. "Whether non-disclosure was the result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, at 154 (1972).

There is reasonable likelihood that this material information could have been used by the defense more effectively than it was had there been reasonable opportunity to examine these reports. The more effec-

tive use of this information by the defense could have effected the judgment of the jury. See, *Napue v. Illinois*, 360 U.S. 264 at 271 (1959). Because of the failure of the prosecution to produce this report in time to allow proper examination of it, Mr. Gaines' counsel's ability to present an adequate defense was hampered. The failure to produce this material, which was properly moved for, constitutes a violation of the defendant's rights to due process of law. The Court should have granted the defendant's motion to dismiss because of the failure to produce this information.

II

ORS 45.600 as interpreted by the Oregon court requires that prior convictions be admitted in order to attack the defendant's credibility, without allowance for the exercise of a court's discretion, based on relevancy or prejudicial effect. This rule and the evidence of defendant's 1964 convictions which were offered pursuant to that rule caused the denial of a fair trial due to this evidence's prejudicial effect on the jury and by forcing the defendant to waive this prejudicial effect against his right to testify in his own defense.

The right of a defendant to testify on his own behalf is basic to our system of jurisprudence and implicitly guaranteed by the due process clause of the Fourteenth Amendment. In *Re, Oliver*, 333 U.S. 257, 273 (1948), *Hovey v. Elliott*, 167 U.S. 409, 418 (1897). This Court held in *Griffin v. California*, 380 U.S. 609 (1965), that a defendant's interrelated constitutionally protected rights to testify in his own defense and to be free from compulsory self-incrimina-

tion were unduly burdened by a prosecutor's conduct in commenting on the defendant's failure to take the stand in his own defense. This Court held that such conduct was an unconstitutional penalty in that it effectively abrogated the defendant's rights "by making its assertion costly." *Griffin* at 614. In *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971), the Supreme Court of the State of Hawaii found the admission of prior convictions to impeach the credibility of a defendant to be a penalty imposed by the Court for exercising a constitutional right, within the meaning of the *Griffin* decision. The Hawaii Supreme Court found:

"... evidence of prior convictions of only minimal relevance to a witness's credibility. In a criminal case, there are added concerns because a defendant's knowledge that the jury making conclusions from the prior convictions that he is guilty may compell (sic) him to forego his privilege to testify. Since there is no compelling reason to impose that burden, we hold that to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense. Insofar as ... rule of this Court allow the introduction of prior convictions in a criminal case to prove the defendant's testimony is not credible, those convictions are at odds with the due process clauses of the Hawaii Constitution, Article I, Section 4, and the Fourteenth Amendment of the United States Constitution." *Santiago* at 661.

The use of prior convictions, especially convictions for

crimes which are temporally remote and of questionable relevancy to credibility, to impeach a criminal defendant who takes the stand in his own defense is of dubious jurisprudential or constitutional validity. The legitimate interest of the State in bringing criminals to justice is not furthered by the use of such convictions. At best, the use of prior convictions to impeach reduces the accuracy of the factual determinations made. Prior convictions are of little real assistance to the jury in determining whether the defendant is credible as a witness. If the prior crime has nothing to do with dishonesty, there may be no logical connection whatsoever between the prior crime and the determination of whether the defendant may be believed. Since the jury is presumed to be qualified to determine whether or not a witness is lying from his demeanor and his reaction to probing questions on cross-examination, there would appear to be little need for evidence of prior convictions. Thorough cross-examination as to the facts should be able to raise doubts not merely about the defendant's general truthfulness, but more importantly, about the credibility of the story he has told in this particular case. The use of such evidence places upon the defendant a burden which is grossly disproportionate to any advantage which the State derives from its use. The criminal defendant is placed in the constitutionally impermissible bind of having to weigh the right, desire, and in this case, the necessity of taking the stand in his own defense against the prejudicial effect of damaging evidence of prior convictions.

Use of prior convictions pose the distinct threat that the finder of fact will be prejudiced and judge the defendant on the basis of and in punishment for his past life. This result would do violence to the fundamental due process concept that all individuals have the right to be judged upon the merits of the action, not upon their life styles or life history. There is a related danger that the prior conviction will be used as propensity evidence to show that a defendant is a "bad man, and therefore, he probably committed the crime in question." To paraphrase this Court in *Bruten v. United States*, 391 U.S. 123 at 135 (1968), the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the facts of human limitation of the jury system cannot be ignored.

The assumption that the severe prejudicial effect of evidence of prior convictions can be countered by instruction to the jury is at best a questionable validity and that worse a naive and unmitigating fiction. See Justice Jackson's comments in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949). While jurors have demonstrated great ability and expertise in making factual determinations in difficult circumstances, they are still only human. The evidence of prior convictions cannot be erased in their minds when the ultimate facts of the case at bar are being determined. As Judge Hand stated in *Nash v. United States*, 54 F.2d 106, 107 (1932):

"... to inform a jury of a prior conviction then to instruct them to consider the conviction only in

relation to the defendant's credibility is to recommend a mental gymnastic which is beyond not only their power, but anyone else's."

These threats to the defendant's right to a meritorious trial presented by the production of evidence of prior conviction effectively discourages defendants from asserting and exercising their right to take the stand and present their own defense. In the present case, it was crucial to his defense that George Gaines take the stand. He was the only defense witness to the altercation and he alone could present evidence on the question of self-defense.

The risk of undue prejudice caused by the introduction of such evidence placed such a burden and risk upon his determination to exercise his right to take the stand in his own defense is to amount to a punishment for the assertion of that right. This burden was especially undue in the light of the comparative harm to the liberty of the defendant due to the severity of the penalty of the crime charged and the minimal benefit to the State in the pressing of its case other than arousing the prejudices of the jury. The comparative harm to the individual and benefit to the State are so disproportionate that the introduction of the temporally remote and factually irrelevant convictions denied defendant his right to due process of law in an action so affecting his liberty.

The State has no legitimate interest in attempting to punish the defendant by stimulating the jury's emotions against him. The law of the State of Oregon does

not normally allow defendant to be exposed to the danger of prejudice due to the admission of evidence of prior convictions. However, the present law did allow the defendant to be exposed to the peril, and this endangering was possible only because the threat to the defendant's liberty was to great as to demand that he testify in his own defense. Such an anomaly runs counter to the fundamental concepts of fair play and substantial justice inherent in due process. The Constitution cannot sanction such a judicially imposed penalty upon the exercise of basic rights.

The inability of the trial judge to exclude such remote, irrelevant, and blatantly prejudicial convictions prevents preservation of those elements of fairness in criminal proceedings which due process guarantees. This Court in *Spencer v. Texas*, 385 U.S. 554 (1967), constitutionally sanctioned the introduction of the defendant's prior conviction in the limited context to prove a recidivist elements required under State Habitual Offenders Statute. This Court did not reach the issue of constitutionality of impeachment by the introduction of prior convictions as such was not raised. However, the majority noted: "Because such evidence (of prior convictions) is generally recognized to have potential for prejudice, it is usually excluded . . ." 385 U.S. at 560. Justice Warren would have found the use of prior convictions, even in the recidivist actions, to be unconstitutional:

"Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. The jury

might punish an accused for being guilty of previous offenses, or feel that incarceration (sic) is justified because the accused is a 'bad man' without regard to his guilt of the crime currently charged. Of course, it flouts the laws of human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him." 385 U.S. at 575.

Justice Warren also noted in his Dissent:

"It seems to me that the use of prior conviction evidence in these cases is fundamentally at odds with traditional notions of due process . . . because it needlessly prejudices the accused without serving any legitimate interest to the State. If I am wrong in thinking that the introduction of prior conviction evidence serves no valid purpose, I am not alone, for the Court never states what interest of the State is advanced by this procedure. This failure, in my view, undermines the logic of the Court's opinion." 385 U.S. at 570.

In George Gaines' case, the trial court felt that it was precluded by statute and court decision from attempting to strike that balance between relevance and prejudice in deciding this question of admission of evidence. The court felt obligated to admit the judgments which were over ten years old, which did not involve crimes which related in any way to one's veracity and credibility (the only statutorily sanctioned purpose for such conviction), and which contain mere allegations of other criminal conduct which never resulted in a conviction. Precautionary instructions were

given, but such instruction was probably an empty gesture. The prosecution succeeded in presenting evidence of little probative value, with great prejudicial effect. Under these facts, ORS 45.600 was applied in such a way as to jeopardize defendant Gaines' right to a trial before an impartial jury. The statute worked to deny defendant's fundamental fairness in his criminal trial by subjecting him to the very real possibility that emotion rather than reason influenced the juror's decision.

The Oregon Trial level and Appellate Courts have expressed dissatisfaction with the rule of admission of such evidence, but litigants are told that their proper avenue for redress is the legislature rather than the courts. To wait for the legislature to change the statute is to allow an important constitutional question to go undecided and a personal liberty to go unprotected.

CONCLUSION

For the above stated reasons, this Court should grant the requested Writ of Certiorari.

Respectfully submitted,

DIANE SPIES
Counsel for Petitioner

March 14, 1977.

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF
OREGON FOR MULTNOMAH COUNTY

THE STATE OF OREGON,)
Plaintiff,) No. C 75-08-2791 Cr
v.) DA 114780
GEORGE ARMSTED GAINES,) JUDGMENT
Defendant.)

On November 20, 1975, this matter came before the court, the plaintiff appearing by Wendell R. Birkland, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Desmond D. Connall.

IT IS ADJUDGED that the said defendant has been convicted on his pleas of Not Guilty and verdicts of GUILTY of the offenses of Counts I and II — ATTEMPTED MURDER and Count III — RECKLESSLY ENDANGERING ANOTHER PERSON, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time,

IT IS FURTHER ADJUDGED that on Count I, said defendant be imprisoned in a correctional facility of the State of Oregon for an indeterminate period of time, the maximum term of which shall be and hereby is fixed at Twenty (20) Years, and said defendant is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon.

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IT IS FURTHER ADJUDGED that on Count II, said defendant be imprisoned in a correctional facility of the State of Oregon for an indeterminate period of time, the maximum term of which shall be and hereby is fixed at Ten (10) Years, said sentence to run consecutively to the sentence imposed on Count I herein, and said defendant is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon.

IT IS FURTHER ADJUDGED that on Count III, said defendant pay a fine in the amount of \$1,000, to be paid through the Office of the Court Administrator of the Circuit Court for Multnomah County.

IT IS ORDERED that upon payment of said fine, any security amount heretofore posted herein by said defendant is exonerated.

BERKELEY LENT, Judge

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APPENDIX B

**IN THE CIRCUIT COURT OF THE STATE OF
OREGON FOR MULTNOMAH COUNTY**

THE STATE OF OREGON,)	No. C
Plaintiff,) 75-08-2791 Cr	
v.) DA 114780	
GEORGE ARMSTED GAINES,) TRIAL ORDER	
Defendant.)	

On November 10, 1975, this matter came before the court for trial of the above defendant on the charges of Counts I and II — ATTEMPTED MURDER and Count III — RECKLESSLY ENDANGERING ANOTHER PERSON, before the Honorable Berkley Lent, the plaintiff appearing by Wendell R. Birkland, Deputy District Attorney, and the defendant appearing in person and with his attorney, Desmond D. Connall.

After receiving evidence and hearing the arguments of counsel, and after due deliberation, the jury returned its verdicts which found said defendant GUILTY as charged on all counts.

IT IS ORDERED that said verdicts be received and entered in the records of this court and cause, and that the jury be discharged from further consideration of this case.

IT IS FURTHER ORDERED that the within matter be continued for imposition of sentence to a later date yet to be determined.

BERKELEY LENT, Judge

A4

APPENDIX C

OREGON SUPREME COURT

January 11, 1977

STATE V. GEORGE ARMSTEAD GAINES
CA 5500

Diane Spies
Connall & Spies

The Supreme Court has today denied petitioner's
Petition for Review in the above-entitled matter.

KEVIN L. MANNIX
State Court Administrator
By *Marilyn Hartley*

MARILYN HARTLEY
Calendar Clerk

A5

APPENDIX D

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

State of Oregon,)
Respondent,) No. C 75-08-2791
v.)
CA 5500

George Armstead Gaines,) Appellant.)

Appeal from Circuit Court, Multnomah County.

Berkeley Lent, Judge.

Argued and submitted September 21, 1975.

Diane Wilp Spies, Portland, argued the cause for
appellant. With her on the brief were Connall & Spies,
P.C., Portland.

Kevin L. Mannix, Assistant Attorney General, Sa-
lem, argued the cause for respondent. With him on the
brief were Lee Johnson, Attorney General, and W. Mi-
chael Gillette, Solicitor General, Salem.

Before Schwab, Chief Judge, and Fort and Lee,
Judges.

FORT, J.

Affirmed.

FORT, J.

The defendant appeals from his conviction for two
counts of attempted murder, ORS 163.115, 161.405,
and one count of recklessly endangering another per-

son, ORS 163.195. The circuit court sentenced defendant to a term of imprisonment not to exceed 20 years on one attempted murder count and 10 years on the other, to run consecutively. On the count of recklessly endangering another person, he was fined \$1,000.

The defendant assigns as error the following instruction to the jury on a theory of reckless attempted murder:

"Although the Information charges only that the defendant intentionally attempted to cause the death of Dorothy Reid and Thomas Reid, you may also return a verdict of Guilty if you find that there was an attempted homicide resulting from the defendant acting recklessly under circumstances manifesting an extreme indifference to the value of human life.

"Attempted murder is a crime which may be committed by a variety of means. . . ."

Counsel stated:

"THE COURT: Plaintiff's exceptions.

"MR. BIRKLAND: None, your Honor.

"THE COURT: Defendant's exceptions.

"MR. CONNALL: I will except to the instruction on any consideration of the prior convictions simply based on my previous position in that respect, your Honor. I don't think there is any need to explain it to the Court further.

"THE COURT: I don't think so.

"MR. CONNALL: *That is all.*" (Emphasis supplied.)

The longstanding rule is that an error asserted for the first time on appeal and not excepted to at trial will not be considered on appeal. *State v. Avent*, 209 Or 181, 302 P2d 549 (1956); *State v. Perry*, 24 Or App 807, 547 P2d 187, Sup Ct review denied (1976). See also: *State v. Peyton*, 8 Or App 479, 493 P2d 1393, Sup Ct review denied (1972). A failure to except will be overlooked only in rare cases. In *Avent* the court said:

". . . It is sometimes less strictly enforced in criminal, and especially in capital, cases, but even then it will not be relaxed unless the court, upon an examination of the entire record, can say that the error is manifest and that the ends of justice will not otherwise be satisfied." 209 Or at 183.

Even assuming, as the state virtually concedes, that the instruction was erroneous under *State v. Smith*, 21 Or App 270, 534 P2d 1180, Sup Ct review denied (1975), and *State v. Reinan*, 75 Adv Sh 2952, 22 Or App 389, 538 P2d 1273 (1975), our review of the record satisfies us that the "ends of justice" do not require reversal. The record clearly indicates from the defendant's own testimony that the shooting of the two victims named in Counts I and II was done intentionally and knowingly by him and that recklessness was not part of either act. The defendant himself testified that he recalled shooting the two victims after he returned, shortly following an earlier visit, to the victims' home with a loaded gun which he deliberately fired at both victims. Accordingly, we decline to notice the error.

A8

The remaining assignments of error do not warrant consideration.

Affirmed.

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APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF
OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF)	No. Cr. Ct. 75-09-2919
OREGON,)	C 75-09-2920
)	MOTION FOR
Plaintiff,)	DISCOVERY AND
v.)	INSPECTION
)	INCLUDING A
GEORGE ARMSTED)	HEARING PURSUANT
Defendant))	THERE TO

Comes now Defendant Gaines, through attorney Des Connall, and moves the Court for discovery and inspection including a hearing pursuant thereto on the following grounds:

1. To promote an expeditious as well as fair determination of the charges, whether by plea or trial;
2. To provide the Defendant sufficient information to make an informed plea;
3. To permit Defendant's attorney to thoroughly prepare for trial and minimize surprise at trial;
4. To avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;
5. To reduce interruptions and complications of trial by identifying issues collateral to guilt or innocence, and determining them prior to trial;
6. To effect economies in time, money, and judicial

and professional talents by minimizing paper work, repetitious assertions of issues, and the number of separate hearings;

7. To afford the accused the opportunity for effective cross-examination; and

8. To meet the requirements of procedural due process and the constitutional and statutory guarantees afforded the accused.

Pursuant to the Constitution, Statutory and Case Law of the State of Oregon and the Federal Constitution as applied to the criminal justice system of the State of Oregon through the 14th Amendment thereto, the Defendant respectfully moves the Court for an Order that the State produce all evidence currently or subsequently in its possession or under its control material to the Defendant on the issues of probable cause to arrest, guilt or innocence, and sentencing, including, but not limited to:

1. All notes, minutes, records, recordings, testimony and transcripts of testimony before any Grand Jury that considered any part of the transaction for which Defendant stands indicted.

2. All oral, written or recorded statements made by Defendant to any state officer(s) or to any third parties within the knowledge, possession or control of the State.

3. The names of all of the witnesses interviewed by the State and their statements.

4. Inspection of all physical or documentary evi-

dence currently or subsequently in the State's possession and/or control with respect to this case whether or not intended to be offered as evidence.

5. Disclosure as to any unusual relationship that has existed or presently exists between any agency of the State and any of the potential witnesses or persons who were present at any time during the probable cause or guilt stage of the investigation of this alleged transaction.

6. Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the State obtained from, or which it may allege belonged to, the Defendant, and/or will use at the hearing or trial.

7. The specific details of any intent by the State to rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

8. The name(s), qualifications, subject of testimony and all reports of any expert witness(es).

9. Reports of tests of physical or mental examinations in the control of or knowledge of the State.

10. Reports of scientific tests, experiments or comparisons and other reports of experts in the control of or known to the State pertaining to this case.

11. Information concerning all arrests and/or prior convictions of persons whom the State intends to call or has relied upon as witness(es) in this matter.

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12. Information of any records of prior police contact, arrests or convictions of Defendant.

13. Any information the State has indicating entrapment of the Defendant.

14. Information as to whether the State has made any promises, assurances or arrangements with any prospective witnesses herein, either express or implied, in order to secure the testimony of said witnesses favorable to the State.

15. Information as to whether the State has or will provide any witness which it may call any remuneration beyond that which a witness is entitled to claim under subpoena, and, if so, the name or names of said witness(es) and amount of such additional remuneration.

16. Information as to whether or not the State has contacted local probation officials, or the sentencing judge of any witness it may summon who is presently on probation, or made any contact with local prosecution officials, probation departments or a judge about to impose sentence on any prospective State Witness, and the names of same, and the contents of such communication.

17. Information as to whether or not the State intends to offer immunity to any witness which it may summon, or has already conferred such immunity, and, if so, the name of such witness(es), whether such immunity is contemplated by Court sanction, or otherwise.

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18. Disclosure of any and all knowledge of an informer involved in the investigation of this matter by the State, and, if so:

a. Who he is;

b. Whether he will be called as a witness;

c. Whether the State or local law enforcement has now or did have incriminating evidence against said informant which could have been or is being withheld from presentment for prosecution in exchange for information allegedly furnished in this case.

d. The criminal record of said informant, if any, including all arrests and/or convictions.

e. Whether said informant has been paid for the information furnished in this case or for the information which law enforcement relied upon to establish his reliability, and, if so, the times and amounts of such remuneration.

19. Disclosure of whether there has been any:

a. Electronic surveillance of the Defendant or his premises; or

b. Leads obtained by electronic surveillance of Defendant's person or premises; or

c. Eavesdropping of Defendant, his premises, or of any person which the State may have used in the investigation of this case; or

d. Leads obtained by such eavesdropping; and,

if so, the Defendant requests the disclosure of all such materials, including tapes, recordings and transcriptions.

20. Disclosure by the State as to whether any person continued to monitor the activities of the Defendant or any of his associates or friends after the Defendant's arrest on this case and the results of such activity. A specific area of interest in this regard relates to the following question:

Did any person under the control or supervision or known to the State cause Denise Burks to be "tailed" or her activities monitored in any fashion which resulted in her being stopped in Los Angeles, California, on or about August 28, 1975 under the guise of being a suspect in a robbery investigation?

Specific Points and Authorities will be provided prior to hearing.

Respectfully submitted,

CONNALL & SPIES, P.C.

By *Des Connall*

DES CONNALL

Of Attorneys for Defendant